diction to extend time except where such power is expressly given to it under a provision of the law.

The application is dismissed with costs.

Application dismissed.

Solicitors: *Shook Lin & Bok; D. G. Ironside.*

LEE FAH SANG v. PUBLIC PROSECUTOR

[F.C. (Azmi C.J. (Malaya), Ong Hock Thye F.J. & Gill J.) June 5, 1967]

[K.L. — Federal Court Criminal Appeal No. X. 1 of 1967]

Penal Code ss. 34 & 387 — Conviction under s. 302 read with section 34 altered to one under s. 387 — Evidence of previous demand not pointed out in direction to jury.

Where there was evidence that the accused and his colleagues had previously demanded money from the deceased and his father and there was therefore a probability that, the accused and his colleagues who went to see the deceased it was for the purpose of extorting, the trial judge should have pointed this fact to the jury and the jury had to be satisfied beyond reasonable doubt that common intention to kill was present long before that time, or in this case could have arisen just before the gun shot fire. There was also the probability that the deceased was killed because he strenously refused to accede to the payment to the extortioners at that moment with the result that further arguments ensued and that therefore, the killing was not the original intention of the persons. In the circumstances, the necessary common intention could not have existed. If thus directed the jury might have not come to the same verdict.

Case referred to:—

(1) *Mahbub Shah* v. *Emperor* (1945), L.R. 72 I.A. 148; A.I.R. 1945 P.C. 118; [1945] M.W.N. 373.

FEDERAL COURT.

K. L. Devaser for the appellant.

Abu Talib bin Othman (Deputy Public Prosecutor) for the respondent.

Azmi C.J. (Malaya): On 11th April 1967, when we heard this appeal we altered the conviction to one under section 387 of the Penal Code and sentenced the appellant to 7 years' imprisonment with affect from that day and also to suffer 10 strokes of the rotan and we indicated we would give our reasons later. I will now read our grounds of judgment.

The appellant was convicted at Malacca on the following charge:—

"That you on the 1st day of September, 1964 at or about 5.00 p.m. at the 10th milestone Tebong Estate, in the District of Alor Gajah, in the State of Malacca, with two others and in furtherance of the common intention of you all, did commit murder by causing the death of one Lock Kwang Weng and thereby committed an offence under section 302 read with section 34 of the Penal Code."

The evidence would appear to show that on the day in question the deceased's wife, P.W.7, his son P.W.8, his father P.W.9 and his sister-in-law P.W.10, at about 5 p.m. heard a sound of a gun-shot coming from the direction of the family's vegetable garden not far from the house. P.W.8 went to investigate and before he could get to where the deceased was working he heard the deceased telling him to go away, at the same time telling him that he, the deceased, had been shot by Wong Kee. P.W.8 turned round and went to the house and about that time he saw three men coming from the direction of the vegetable garden. They were Wong Kee with a gun,, the appellant with a parang and another known as Ah Kong Chai. P.W.7, P.W.9 and P.W.10 who were then in the house saw the three persons. P.W.10 fired a shot from a gun in the house. The three persons then turned away and ran towards the jungle.

There was evidence to the fact that previous to this incident, the appellant and other persons had tried to extort money from the deceased and his father P.W.9.

The prosecution also relied on certain dying declarations made by the deceased to the effect that he was shot by Wong Kee and slashed by the appellant and that the third man was also present there.

One of the grounds of appeal reads as follows:—

"The learned trial judge failed to give the jury sufficient and/or proper direction on the issue of common intention that they must be satisfied on the evidence that there existed between the appellant and 2 others a common intention to kill the deceased."

The learned judge in his summing-up read to the jury the provision of section 34 of the Penal Code which reads as follows:—

"When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone."

He then went on to illustrate the above as follows:—

"As an illustration let us say that *A*, *B* and *C* acting together went out with the intention of murdering *Z*, and one of them carried a gun. When they met *Z*, *A* caught hold of him, *B* stood by preventing anyone giving assistance to *Z*, and *C* shot *Z* dead with the gun. All of them would be guilty of the murder of *Z* even though two of them did not fire the shot. On the other hand if *A*, *B* and *C* acting together went out with the intention of robbing *Z*. When they met *Z*, *A* caught hold of him and *Z* puts up a fight. Then *B* took out a concealed dagger from his pocket and stabbed *Z* to death. In this case, only *B* is guilty of murder as their common intention was to commit robbery."

Then the learned judge explained the meaning of the word "intention" and that the existence of an intention could be inferred from surrounding circumstances such as the type of weapon used, the nature of injuries inflicted, and the parts of the body where the injuries were inflicted. He then went on to say "in like manner common intention can also be proved."

Lord Thanterton in *Mahbub Shah* v. *Emperor* (1) said:—

"To invoke the aid of s. 34 successfully, it must be shown that the criminal act complained against was done by one of the accused persons in furtherance of the common intention of all; if this is shown, then liability for the crime may be imposed on any other of the persons in the same manner as if the act were done by him alone. This being the principle, it is clear to their Lordships that common intention within the meaning of the section implies a pre-arranged plan, and to convict the accused of an offence applying the section it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan. As has been often observed it is difficult, if not impossible, to procure direct evidence to prove the intention of an individual — in most cases it has to be inferred from his act or conduct or other relevant circumstances of the case."

In view of the fact that there was evidence that the appellant and his colleagues had previously demanded money from the deceased and his father and there was therefore a probability that when the three persons went to see the deceased it was for the purpose of extorting, he should have pointed this fact to the jury and therefore the jury had to be satisfied beyond reasonable doubt that common intention to kill was present long before that time, or could it have arisen just before the gun shot fire. In our view there was also this probability that the deceased was killed because he strenously refused to accede to the payment to the extortioners at that moment with the result that further arguments ensued and that therefore, the killing was not the original intention of the persons. In the circumstances of course, the necessary common intention could not have existed. We are not sure that if directed thus, the jury would have come to the same verdict.

In the circumstances, we altered the conviction to one under section 387 of the Penal Code and passed sentenced as I have indicated at the beginning of this judgment.

Conviction and sentence altered.

Solicitors: *K. L. Devaser & Co.*

LEONG SOW LIN & ANOR. v. PUBLIC PROSECUTOR

[A.Cr.J. (MacIntyre J.) June 8, 1967]

[Ipoh — Criminal Appeal No. 37 of 1967]

Road Traffic — Private vehicle — Conveyance of passengers — Whether for hire or reward — Whether vehicle was used as a public service vehicle — Road Traffic Ordinance, 1958, ss. 74(2),92(1) & 144(a).

The appellants were convicted on charges under sections 92(1) and 74(2) of the Road Traffic Ordinance. In convicting the appellants the learned magistrate held that on January 30, 1966 the 2nd appellant, with the permission of the 1st appellant, used the car in question as a public service vehicle for the conveyance of passengers for hire or reward. The facts were as follows: On the morning of January 30, 1966 the 2nd appellant parked the car at the Ipoh Aerodrome opposite the police barracks. He was asked by a police constable and his wife for assistance to take their sick child to see a doctor at Ipoh. He agreed and invited the couple to get into a car. Following the couple were two others whom the 2nd appellant saw coming out of the guardroom of the police camp whom he knew to be police constables. He asked them whether they were going to Ipoh. Both replied in the affirmative and got into the car. While proceeding to Ipoh the car was stopped by the police and the car and passengers were taken to the police station. At the trial the policeman and his wife who were said to be taking their child to a doctor were not called to give evidence, nor were they offered as witnesses to be called by the defence. The two constables who were called to give evidence said that when they got into the car they were under the impression that they were getting a free lift, although they would have paid a fare at the end of the journey if asked to do so.

Held: all the circumstances of the case coupled with the 2nd appellant's evidence were of sufficient weight to rebut the presumption that the passengers were carried for hire or reward. The conviction and sentence should be set aside and the car released to the 1st appellant.

Cases referred to:—

(1) *Aitken* v. *Hamilton* [1964] Crim. L.R. 546.

(2) *Din* v. *Public Prosecutor* [1963] M.L.J. 37.

MAGISTRATE'S CRIMINAL APPEAL.

Chin Fook Yen for the appellants.

Idris bin Yusoff (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

MacIntyre J.: This is an appeal from conviction and sentence in Ipoh Traffic Summons Case Nos. 1661 and 1662 of 1966 by the appellants herein of offences punishable under sections 92(1) and 74(2) of the Road Traffic Ordinance.

The 1st appellant is the wife of the 2nd appellant and is the registered owner of motor car No. AA 7668. In convicting the appellants the learned magistrate held that on 30th January 1966, the 2nd appellant used the said car as a public service vehicle for the conveyance of passengers for hire or reward with the permission of the 1st appellant. It was not in dispute that a policy of insurance had not been taken out to cover third party risks in respect of the user of the said car as a public service vehicle. However, the relevancy of the charge depended upon whether or not the car was used at the material time as a public service vehicle.

For a fortnight about 2 months before the date of the commission of the alleged offence, the car was seen about twice a day, once in the morning and once in the afternoon carrying passengers along Brewster Road, Anderson Road or Hugh Low Street by two police constables, namely, P.W.3 and P.W.4. All the passengers alleged to have been carried were said to be Chinese but it was not stated in evidence whether the passengers carried on each occasion were the same or not. If the passengers carried on each occasion were the same, they might have been members of the appellants' family in which case there could have been no justification for any suspicion that they were being carried for hire or reward. In the circumstances, I do not think